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No. 01-417

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ROBERT J. DEVLIN,

Petitioner,

v.

ROBERT A. SCARDELLETTI, Trustee of the Transportation Communications International Union Staff Retirement Plan, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF CHARLES L. GRIMES AND GORDON W. CHAPLIN, TRUSTEES UNDER THE WILL OF LOUISE C. CHAPLIN; CHARLES L. GRIMES AND GORDON W. CHAPLIN, TRUSTEES UNDER THE LOUISE D. CATHERWOOD TRUST, AND GORDON W. CHAPLIN, INDIVIDUAL TRUSTEE OF THE JESSICA D. CATHERWOOD TRUST, AS AMICI CURIAE IN SUPPORT OF PETITIONER

THADDEUS HOLT
Counsel of Record
P.O. Box 440
Point Clear, Alabama 36564
(334) 990-7495

DAVID A. JENKINS
JOELLE E. POLESKY
SMITH, KATZENSTEIN & FURLOW LLP
800 Delaware Avenue, 7th Floor
P.O. Box 410
Wilmington, Delaware 19899
(302) 652-8400

Attorneys for Amici Curiae

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QUESTION PRESENTED

Can class members who are not named parties to a class action appeal the district court's rejection of their objections to a settlement, properly presented in response to notice required by Rule 23 of the Federal Rules of Civil Procedure, without going through an intervention proceeding to redesignate them as named parties?

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BRIEF OF AMICI CURIAE CHARLES L. GRIMES *ET AL.* IN SUPPORT OF PETITIONER

I. Interest of the Amici Curiae

Consents of the petitioner and the respondents to the filing of this brief are being lodged with the Clerk.[1]

These amici curiae have a direct interest in the present case because its outcome will directly govern a major issue in a Seventh Circuit case in which they were unsuccessful appellants and which they are bringing to this Court on petition for certiorari. Like the petitioner here, they were unnamed class members in a class action, who properly appeared in the trial court (the District Court for the Northern District of Illinois) and objected to a proposed settlement. Their objections were denied, the settlement was approved and judgment entered, and they appealed to the Seventh Circuit. The Seventh Circuit is one of those which require that an unnamed party to a class action formally intervene and become a named party in order to appeal denial of objections to a settlement. *Felzen* v. *Andreas*, 134 F.3d 873 (7th Cir. 1998), *aff'd by an equally divided*

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[1] No party or counsel for a party authored any part of this brief. No person not an amicus made any monetary contribution to the preparation or submission of this brief.

court sub nom. California Public Employees' Retirement System v. *Felzen*, 525 U.S. 315 (1999).[2] They accordingly moved to intervene in the trial court, but their motion was denied. They appealed the denial of intervention and conditionally appealed the rejection of their objections to the settlement, suggesting also that the Seventh Circuit reconsider and overrule *Felzen*. The court affirmed the denial of intervention and refused to reconsider *Felzen*. *In the Matter of: Navigant Consulting, Inc., Securities Litigation*, ____ F.3d ____, No. 01-2311, 2001 WL 1646846 (7th Cir. December 26, 2001), reprinted in the Appendix hereto. Speaking for the court, Judge Easterbrook said that *Felzen* "is not a candidate for reconsideration. . . . The ball is in another Court, which has indicated an inclination to take a new look at the subject. [Citing the instant case.] That is the right forum for further debate." App. 5a.

So, consonant with Judge Easterbrook's suggestion, amici hope to make a contribution to the "further debate" in this "forum."

Judge Easterbrook's opinion in *Navigant* rests on a somewhat different rationale from that of the court below in the instant case: focusing, for example, on what he called a "formal position" regarding the meaning of "parties" under FED. R.

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[2] Actually, *Felzen* involved a stockholder's derivative suit. But the Seventh Circuit regards its decision in *Felzen* as governing both types of action. See *Felzen*, 134 F.3d at 875, 876. As noted herein, the oral argument in this Court in that case addressed whether the rule for appealing rejection of objections to settlement of such a suit should be the same as the rule for appealing rejection of objections to settlement of a class action.

APP P. ("FRAP") 3 rather than on what he called "policymaking by judges," which he regarded as the basis for the Fourth Circuit's decision in the instant case, App.5a; and rejecting the view of the court below in this case that the question is one of "standing." App. 6a. The *Navigant* opinion offers several propositions that might be thought to support the result below in the present case even though they might not have been made by the Fourth Circuit. Amici respectfully suggest that it may be helpful to the Court to address arguments of this kind from *Navigant*. This brief will therefore concentrate on those points and will try not to duplicate arguments that the petitioner can be expected to make here.

We note in addition that *Navigant* makes it clear that the parties in the instant case misapprehended Seventh Circuit law with respect to intervention for purposes of appeal. See Reply for the Petitioner at 8 ("the rule in the Seventh Circuit is that a class action objector has an effectively *per se* right to intervene, even after the settlement is consummated, in order to preserve his right to appeal as a formal 'party'"); Petition for Certiorari at 13; Brief in Opposition for Respondents at 15-16. But *Navigant* has now belied this optimistic interpretation, coming up with a significant new stumbling-block to appeal of rejection of objections to a settlement: a drastic "timeliness" requirement not previously imposed, which would effectively require formal intervention long before the settlement.

II. Summary of Argument

Neither the Federal Rules of Appellate Procedure nor this Court's decision in *Marino* v. *Ortiz*, 484 U.S. 301 (1988), mandates that an unnamed class member in a class action intervene in the district court under FED R. CIV. P. 24 and become a named party, in order to appeal rejection of properly made objections to a settlement. *Marino* is wholly irrelevant; it deals with total strangers to the litigation; and even so, it merely says that intervention is "the better practice." As for FRAP 3, it need not be read as limiting appeals to named "parties" in the district court. It is long settled that various classes of person who are not named parties can legitimately appeal. Even if FRAP 3 did impose such a limitation, the word "party" has no fixed and rigid definition; in various circumstances it includes persons who are not named parties; and in particular, unnamed class members in a class suit have been regarded as "parties" from the inception of the modern class action in the early 1700s. Moreover, a class member who appears and presents objections is a "party" in every meaningful sense.

Requiring formal Rule 24 intervention in the district court in order to appeal rejection of properly presented objections to a class action settlement would interpose a wholly unnecessary burden on the analysis of settlements for their fairness. General policy considerations overwhelmingly favor the elimination of all such unnecessary obstacles, and in particular the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 STAT. 737, 15 U.S.C. § 77u ("PSLRA"), reflects a strong Congressional policy in favor of facilitating a searching

examination of class action settlements. The requirement of formal intervention will burden the appellate courts with appeals of denials of intervention, introducing collateral issues and diverting their attention from their proper function of reviewing the merits of settlements. If the Court should nevertheless conclude that intervention is required, it should be made clear to the lower courts that such intervention is of right and *pro forma*, that a post-judgment application is timely, and that the paperwork required in conventional interventions is unnecessary and should be dispensed with.

III. Argument

A. "Party" Is Not a Term With a Fixed Invariable Meaning, and Mechanical Interpretation of FRAP 3 and *Marino* v. *Ortiz*, 484 U.S. 301 (1988), as Permitting Appeals Only by Formal, Named Parties Is Incorrect.

Navigant is based on an inflexible, mechanical interpretation (a "formal position," Judge Easterbrook called it, App. 5a) of the word "parties" in FRAP 3. FRAP 3 limits appeals to "parties," *Navigant* says, and "parties," it holds in effect, means, and only means, formal parties named in the caption of the complaint in the district court.[3]

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[3] "Only parties may appeal from judgments entered in federal litigation. See FED. R. APP. P. 3; *Marino* v. *Ortiz*, 484 U.S. 301 (1988)." App. 1a. "Appellate Rule 3 limits appeals to parties, and in *Marino* the Supreme Court enforced that requirement." App. 5a. Appellants in *Navigant* "ignored that rule and attempted to appeal without becoming parties." App.1a.

But nothing in the language of FRAP 3 limits appeals to "parties," much less to formal named parties. In the first place, FRAP 1(b) is explicit that nothing in FRAP is to be construed "to extend or limit the jurisdiction of the courts of appeals." More specifically, FRAP 3(a), dealing with the filing of the notice of appeal, uses the generic term "appellant" and never refers to "parties." FRAP 3(b), dealing with joint or consolidated appeals, and 3(c), dealing with contents of the notice of appeal, both refer to "parties," but as there used the term necessarily refers to parties to the *appeal*. For it is indisputable that many categories of appellants who were not parties below are allowed to take an appeal and be listed in the notice of appeal. A familiar example is appeals of sanctions imposed on lawyers not themselves parties. *E.g.*, *Collier* v. *Marshall, Dennehey, Warner, Coleman & Goggin*, 977 F.2d 93, 94-95 (3d Cir.1992) (lawyer appealing sanction order must be listed in notice of appeal)[4]; *Mylett* v. *Jeane*, 879 F.2d 1272 (5th Cir. 1989); *FTC* v. *Amy Travel Serv., Inc.*, 875 F.2d 564 (7th Cir. 1989). Though compliance with Rule 3(c) is a jurisdictional prerequisite, its purpose, after all, is simply to give notice of who will be parties to the appeal. *Smith* v. *Barry*, 502 U.S. 244, 248 (1992); *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 318 (1988).

Notably, *FRAP 3(c)(3), dealing with class actions, does not mention "parties" at all* — much less "named parties." This provision — which, be it

[4] Note that *Collier* specifically holds that the term "party" in FRAP 3(c) includes such an appellant, who was clearly not a named party in the action appealed from.

noted, was not in the Rules at the time of *Felzen* (it was added in the amendments effective December 1, 1998) — provides rather that "the notice of appeal is sufficient if it names *one person qualified to bring the appeal as representative of the class.*" (Emphasis added). In light of FED. R. CIV. P. 23(e), this language can have no purpose save to encompass class members who have objected to a settlement. "The primary concern addressed by Rule 23(e) is the protection of class members whose rights may not have been given adequate consideration during the settlement negotiations," *In re New Mexico Nat. Gas Antitrust Litig.*, 607 F. Supp. 1491, 1497 (D. Colo. 1984); the function of objections, in other words, is to ensure that the settlement is fair, reasonable, and adequate to the class as a whole.[5]

Marino v. *Ortiz*, 484 U.S. 301 (1988) (per curiam), cited by Judge Easterbrook as confirming the wooden interpretation of "parties" (see footnote 2), has nothing whatever to do with the issue here.[6] That case dealt with total strangers to the litigation — persons who, while the settlement might affect them, had been participants in the case in no sense

[5] And not merely to "contest the faithfulness or honesty of the self-appointed plaintiffs," as the Seventh Circuit suggested in *Felzen* v. *Andreus*, 134 F.3d at 876.

[6] "Q: . . . *Marino* v. *Ortiz* involved . . . people who were genuinely antagonistic. . . . They were certainly not represented by the black plaintiffs who were suing. . . . But for the Seventh Circuit to say it follows like the night the day, it didn't. Whatever — whatever the answer may be, it didn't come out of that decision." Transcript of Oral Argument in *California Public Employees' Retirement System* v. *Felzen*, No. 97-1732, at 56-57.

whatever, as class members or in any other capacity. Understandably, this Court held that it was "the better practice" to require them to intervene as parties in order to appeal. 484 U.S. at 304. Even with respect to such true non-parties, the leading commentators have not interpreted *Marino* as mandating intervention in all circumstances. "[T]he brief statement that better practice demands intervention should not be taken to establish a requirement applicable to all circumstances." 15A WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE § 3902.1 at 130 n.52 (2d ed. 1992); *id.* at 122 n.34 (same). "Appeal by way of a simple notice of appeal should be available . . . to nonparties directly bound or affected by an order." *Id.* at 132.

Indeed, there is no general, rigid, "formal" definition of the word "party." Its meaning in any particular context depends on the circumstances. In Judge Boldt's words:

> "In its broadest meaning the word 'party' includes one concerned with, conducting, or taking part in any matter or proceeding, whether he is named or participates as a formal party or not. In a variety of situations persons not named in cause title [*sic*] and not appearing in any formal capacity have been held to be 'parties' or 'a party to' litigation in which they were concerned or affected."

Fong Sik Leung v. *Dulles*, 226 F.2d 74, 81 (9th Cir. 1955) (footnotes omitted). Each case requires examination of the circumstances in order to ascertain how the term is meant. Thus, *Fong Sik*

Leung itself dealt with whether the named plaintiff, a father suing as guardian ad litem on behalf of his minor son to establish the son's citizenship, was a "party" within the meaning of FED R. CIV. P. 35, authorizing the district court to order physical examination of a "party."[7] On the basis of the history of Rule 35 and of federal courts' historic power (or lack of it) to require such examinations, the court held that even though the father was the named plaintiff, he was not a "party" within the intendment of the Rule.

B. History, Established Usage, and Policy Considerations All Support Inclusion of Unnamed Class Members as "Parties" For Purposes of Appeal.

1. Unnamed Class Members Have Been Considered "Parties" Since the Inception of the Modern Class Action Nearly 300 Years Ago.

Throughout the nearly 300-year history of the modern class action, unnamed class members have been considered to be parties; often called "unnamed parties" or the like — by contrast with "named parties" or "parties by name" or "made parties" — but *parties* nevertheless.

The modern class action (as opposed to medieval actions to establish villagers' rights to use of common land and the like, see generally YEAZELL,

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[7] Before 1970, Rule 35 authorized only examination of parties. See Notes of Advisory Committee on 1970 Amendments to Rules ("Rule 35(a) has hitherto provided only for an order requiring a party to submit to an examination").

FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987)) stems from *Chancey* v. *May*, Prec. Ch. 591, 24 Eng. Rep. 265 (Ch. 1722) (Lord Parker, L.C.). Having its origin in the speculative fever of the era of the South Sea Bubble, that case foreshadowed latter-day class actions on behalf of disaffected investors. Two partners in a venture sued "in behalf of themselves, and all other proprietors and partners" — evidently nearly 800 in number — ". . . except the defendants, who were the late treasurers and managers, . . . to call them to an account for several misapplications, mismanagements, and embezzlements, of the copartnership . . . ." In the words of the report: —

> "The defendants demurred, for that all the rest of the proprietors were not made parties, and so every one had the same right to call them to an account, and then they might be harassed and perplexed with a multiplicity of suits; but the demurrer was disallowed,
>
> "1*st*, Because it was in behalf of themselves, and all others the proprietors of the same undertaking, except the defendants, *and so all the rest were in effect parties*.
>
> "2*dly*, Because it would be impracticable to make them all *parties by name*, and there would be continual abatements by death and otherwise, and no coming at justice, if all were to be *made parties*."

(Emphasis added.) The case thus set forth the same rationalia as justify the class action device today:

that one or a few members of a class sharing a common interest represent the whole; and the unwieldiness that would result if all members of a large class were "made parties" or "parties by name." And it recognized clearly that the unnamed class members were "in effect parties."

The Court of Chancery drove the latter point home a few years later:

> "No doubt but a bill may be by a few creditors in behalf of themselves and the rest, to have an account of real and personal estate for relief of all; and then the decree lets in all the others; and *they are considered as parties*, that bill not being confined to a select number . . . ."

Leigh v. *Thomas*, 2 Ves. Sen. 312, 313, 28 Eng. Rep. 201 (Ch. 1751) (Strange, M.R.) (emphasis added).

Though an invention of English Chancery, over succeeding decades (and centuries) the class action saw greater development in the United States than in the mother country. See generally YEAZELL, *supra*. And American cases frequently speak of unnamed class members as "parties."[8] *E.g.*, *Allessandro* v. *State Farm Mut. Auto. Ins. Co.*, 480

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[8] Not, be it noted, merely "quasi-parties" as in *Blossom* v. *Milwaukee & Chicago R. Co.*, 68 U.S. (1 Wall.) 655 (1863) (bidder for property in foreclosure sale allowed to appeal trial court's refusal to complete and confirm sale) and its progeny, such as *Hinckley* v. *Gilman, C. & S. R. R.*, 94 U.S. 467 (1876) (receiver); *Sage* v. *Railroad Co.*, 96 U.S. 712 (1877) (persons interested in order confirming sale); *Williams* v. *Morgan*, 111 U.S. 684 (1884) (objectors to trustee charges).

Pa. 274, 279 n.9, 409 A.2d 347, 350 n.9 (1979) ("[A]ll members of a class action are 'parties plaintiff' upon the filing of the complaint"); *Hansen* v. *Smith*, 395 P.2d 944, 945 (Wyo. 1964) ("[T]he parties-plaintiff include both the persons identified by names as such and also those specifically referred to as members of the class . . ."); *City of Hobart* v. *Baum*, 237 Ind. 316, 318, 145 N.E.2d 573, 574 (1957) ("We recognize the fact that an unnamed member of the class is a party to the suit from the beginning, in the sense that he cannot file a separate suit based upon the subject-matter of the class action"); *Bowles* v. *Superior Court*, 44 Calif. 2d 574, 586, 283 P.2d 704, 712 (1955) (en banc) (unnamed class members are "represented parties; hence they are parties in legal effect"); *Phillips* v. *Brandt*, 231 Minn. 423, 428, 43 N.W.2d 285, 289 (1950) ("The motion here is not to bring in additional parties, but to designate by name parties already plaintiffs by virtue of the fact that they are within the class for which the action was brought"); *Kaufmann* v. *Annuity Realty Co.*, 301 Mo. 638, 256 S.W. 792, 797 (1923) (unnamed class members were "in effect plaintiffs . . . in effect parties").

In the seminal case in this Court setting forth the due process requirements of a class action, *Hansberry* v. *Lee*, 311 U.S. 32 (1940), Chief Justice Stone spoke of unnamed class members as "parties" no less than eight times, referring to "determining whether the absent *parties* are bound by the decree," 311 U.S. at 42; whether a procedure "fairly insures the protection of the interests of absent *parties*," *ibid.*; "the *parties* present and those who are absent," *id.* at 43; "the *parties* who are represented though absent," *ibid.*; "due regard for the protection of the

rights of absent *parties*," *id.* at 44; "that protection to absent *parties* which due process requires," *id.* at 45; "[t]he doctrine of representation of absent *parties* in a class suit," *ibid.*; and "the fraudulent and collusive sacrifice of the rights of absent *parties*," *ibid.*; contrasting such *absent* parties with "*formal* parties to the suit," *id.* at 42. (Emphasis added in each quotation.) And see *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 551 (1974): "[T]he claimed members of the class stood as *parties to the suit* until and unless they received notice thereof and chose not to continue." "[T]he commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been *parties* had the suit been permitted to continue as a class action." *Id.* at 554. *Cf. Franks* v. *Bowman Transp. Co.*, 424 U.S. 747 (1976) (mooting of named plaintiff's claim does not moot class action).

As one Justice said in oral argument in this Court in *Felzen*, contrasting the status of unnamed class members in a class action with that of non-suing shareholders in a derivative action:

> "Q: But in class actions, they're non-named parties, but they're parties. Isn't that so? The — in a regular class action, there's a representative of a class, but all the members of the class are parties. They're not named parties, but they're parties . . . ."

Transcript of Oral Argument in *California Public Employees' Retirement System* v. *Felzen*, No. 97-1732, at 11-12; see *id.* at 22-23.

Finally, an unnamed class member who has actually come in and lodged objections to a

settlement is a "party" in every practical sense. Rule 23(e) requires that he be given notice and an opportunity to be heard. He has a right to present his objections, and the right to conduct discovery and present evidence under proper control of the court to avoid abuse. 2 NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS § 11.57 (3d ed. 1992). He can exercise those rights without going through the formality of intervention.[9] At the very least, he is a *litigant* for purposes of presenting his objections — even without intervening. Such a *litigant* should have the same right as all other litigants to be an *appellant* — to have a decision rejecting his objections reviewed by an appellate court without being made to jump through additional, unrelated, hoops.[10]

Before leaving this topic, we note one argument in the *Navigant* opinion that is particularly weak. It suggests that unnamed class members are not parties because "if they were, their citizenship would count for purposes of the complete-diversity

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[9] Thus, the kind of exploration which the court in *Navigant* suggested could have been carried out if the objectors had intervened, App. 6a - App. 7a, can just as well be conducted without intervention in a properly managed fairness hearing. (If actually relevant, of course; in *Navigant* itself the asserted need for such discovery was a belated suggestion first brought up as a makeweight argument on appeal.)

[10] The court below in this case considered ability to appeal as a question of "standing." The *Navigant* opinion disagrees, limiting the term "standing" to the "injury in fact" type of standing that underlies an Article III case or controversy. App. 6a. This appears to us to be a semantic debate that does not affect the outcome.

requirement in suits under 28 U.S.C. sec. 1332." App. 5a. With respect, this is simply wrong.[11] For all representative suits — not just class actions — it has long been established that "the jurisdiction of the Federal courts depends, not on the relative situation of the *parties concerned in interest*, but on the relative situation of the *parties named in the record*." *Mexican Cent. R. Co.* v. *Eckman*, 187 U.S. 429, 434 (1903) (emphasis added).[12] "[W]e have repeatedly held that representatives may stand upon their own citizenship in the federal courts irrespectively of the citizenship of the persons whom they represent . . . ." *City of New Orleans* v. *Gaines' Adm'r*, 138 U.S. 595, 606 (1891). As Justice Black put it in *Snyder* v. *Harris*, 394 U.S. 332, 340 (1969):

> "Under current doctrine, if one member of a class is of diverse citizenship from the class' opponent, and no nondiverse members are *named* parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant and have nothing to fear from trying the lawsuit in the courts of their own State. See *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356 (1921)."

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[11] *Smith* v. *Sperling*, 354 U.S. 91 (1957), cited by the court in connection with this proposition, deals not with class or other true representative actions, but with the three-way alignment of *named* parties in a shareholder's derivative suit (shareholder, corporation, defendant).

[12] Unless the named party is "a mere figurehead, a nominal party," a "merely formal part[y]," 187 U.S. at 433-34; which a class representative clearly is not.

(Emphasis added). (*Supreme Tribe of Ben-Hur* confirms that class actions follow not only the general principle that the citizenship of unnamed parties is disregarded, but also the further principle that diversity is measured by the original complaint, so that jurisdiction survives the later addition of a non-diverse class member as a named party).

2. Policy Considerations Strongly Favor Liberal Appeals of Rejections of Objections to Class Action Settlements, Without the Encumbrance of Formal Intervention.

Whether the issue here be regarded as interpretation of the word "party" in FRAP 3(c), as interpretation of the word "appellant" in FRAP 3(a), as interpretation of the scope of the language regarding class actions in FRAP 3(c)(3), or as a policy determination, the key considerations are the same: the role of objectors to class settlements in assuring justice, and the proper spheres of the trial and appellate courts respectively.

(a) Obstacles Should Not Be Put in the Way of Searching Examination of Class Action Settlements, in Light of the Widely Recognized Potential for Collusion and the Public Policy Clearly Expressed by Congress.

Commentators, and many judges, have for years recognized the potential for corrupt class action settlements in which supposedly "representative" plaintiffs — often merely alter egos for lawyers

engaged full time in the trade — bargain away the rights of the class in exchange for generous legal fees. "Much like the production of sausage and legislation," Professor John C. Coffee, Jr., of Columbia Law School wrote in 1991, "the settlement of securities litigation is a process that the high-minded are best advised not to examine too closely." Coffee, *Suspect Settlements in Securities Litigation*, NEW YORK LAW JOURNAL, March 28, 1991, at 5 col. 1.[13] In 1994 the Chairman of the SEC noted that "virtually all securities class actions are settled for some fraction of the claimed damages, and some allege that settlements often fail to reflect the underlying merits of the cases," and urged that ways be found "to give shareholders greater control over their own litigation and curb potential conflicts of interest between class action lawyers and the shareholders they represent." Remarks by Chairman, Arthur Leavitt . . . Securities Regulation Institute, U. of Calif. San Diego, January 26, 1994, at 3, 6.

The scandal spilled over into the general press. See, *e.g.*, Coffee, *The Corruption of the Class Action*, WALL ST. JOURNAL, Sept. 7, 1994, at A15. "Millions for Us, Pennies for You," trumpeted a headline in

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[13] See also, *e.g.*, Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 714-20 (1986); Coffee, *The Unfaithful Champion: The Plaintiff As Monitor in Shareholder Litigation*, 48 LAW & CONTEMP. PROBS. 5, 26-33 (Summer 1985); Coffee, *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 232-33, 239-46 (1983).

the New York Times in late 1993, with the subhead: "Suits on behalf of investors enrich lawyers. But what of their clients?" NEW YORK TIMES, December 19, 1993, Section 3, at 1. ("'The lawyers' interest shifts from protecting the investor to protecting the deal.'") See also Moses, *Off to Court: Lawyer Given To Filing Shareholder Lawsuits Comes Under Scrutiny*, WALL ST. JOURNAL, October 28, 1992, at 1, col. 8; "*Coupon Clipping for Lawyers,*" WALL STREET JOURNAL, November 18, 1993, at A20 col. 1 ("[W]e have a hard time believing the lawyers deserve their money for producing a settlement in which all the real money goes to the lawyers. . . . Funny, we thought the justice system was supposed to have something to do with, well, justice.")[14]

It is to guard against precisely this abuse that Rule 23(e) requires that unnamed class members be given notice of a proposed settlement, so they can have a fair opportunity to object. After all, if they do not, who will? Once the settlement deal is cut, there are no longer adversaries before the court; the named parties have every incentive to defend the deal and none whatever to question it. (And realism compels recognition that the court itself will often be predisposed to see a case disposed of by settlement.) As Judge Friendly said in his eloquent dissent in

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[14] See also Lambert, *Public Interest Law Group Fights Some Class Settlements as Unfair*, WALL ST. JOURNAL, August 17, 1995, at B4; Baron, *An Asbestos Settlement With a Hidden Agenda*, WALL ST. JOURNAL, May 6, 1993, at A11, col. 3; Burton, *The Litigator: How Stanley Chesley Settles Things Quickly in Mass-Injury Suits: Class-Action Attorney Earns Big Fees in Settlements Some Say Are Premature*, WALL ST. JOURNAL, June 26, 1992, at 1, col. 1.

Alleghany Corp. v. *Kirby*, 333 F.2d 327 (2d Cir. 1964), *aff'd en banc by an equally divided court*, 340 F.2d 311 (2d Cir. 1965), *cert. dismissed*, 384 U.S. 28 (1966) (a derivative suit), for the settling parties —

> "a juicy bird in the hand is worth more than the vision of a much larger one in the bush, attainable only after years of effort not currently compensated and possibly a mirage. Once a settlement is agreed, the attorneys for the plaintiff shareholders link arms with their former adversaries to defend their joint handiwork. . . . All the dynamics conduce to judicial approval of such settlements."

333 F.2d at 347 (Friendly, J., dissenting.)[15]

Congress took note of the scandal, and after several years of hearings and investigations[16] enacted the PSLRA for class actions under the

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[15] "The effort to obtain court approval entails the suspension, if not termination, of hostilities. In assessing settlements of representative actions, judges no longer have the full benefit of the adversarial process. . . . In seeking court approval of their settlement proposal, plaintiffs' attorneys' and defendants' interests coalesce and mutual interest may result in mutual indulgence. The parties can be expected to spotlight the proposal's strengths and slight its defects. In such circumstances, objectors play an important role by giving courts access to information on a settlement's merits." *Bell Atlantic Corp.* v. *Bolger*, 2 F.3d 1304, 1310 (3d Cir. 1993) (citations omitted).

[16] E.g., *Private Litigation Under the Federal Securities Laws: Hearings Before the Subcommittee on Securities of the Senate Committee on Banking, Housing, and Urban Affairs*, S. HRG. 103-431, 103d CONG., 1st SESS. (1993).

securities laws. Among other provisions, it seeks to eliminate "professional lead plaintiffs" (and their professional lead lawyers and the attendant races to the courthouse) by providing for a court-selected lead plaintiff who in turn chooses lead counsel; cuts down on "fishing expedition" lawsuits; and, most significantly for the instant issue, requires extensive detail in settlement notices, including a statement of the recovery agreed on, a statement of the potential recovery, a statement and explanation of attorneys' fees to be sought, and a statement of the reasons for proposing the settlement. 15 U.S.C. § 77u-1(a)(7).

The reason for this last provision is obvious: to make it easier for class members to evaluate the proposed settlement so as to enable them to object if they feel they should do so. Thus, the conference committee quoted the testimony of a class member in two separate securities fraud lawsuits: "I feel that the settlement offer should have told the stockholders how little of their losses will be recovered in the settlement, and that this is a material fact to the shareholder's *decision to approve or disapprove the settlement*." H. R. CONF. REP. NO. 104-369, 104TH CONG., 1ST SESS. at 36 (1995) (emphasis added).

In other words, the PSLRA reconfirms, through provisions that transcend the merely procedural and in effect impose substantive limits, that it is the public policy of the United States to facilitate a searching examination of class action settlements; to impose what Judge Friendly in *Alleghany*, *supra*, called "a high standard with respect to disclosure at settlement hearings" and to subject arguments in favor of the settlement "to a most icy scrutiny." 333

F.2d at 347. (And though the PSLRA itself deals only with securities cases, identical policy considerations apply to all class actions.) Scrutiny at least as icy should be accorded to erection of obstacles, unrelated to the merits, to efforts by class members — whose rights, after all, will be determined and possibly cut off forever — to bring before the court perceived ways in which the settlement is not fair, reasonable, and adequate.

Foremost among these obstacles would be requiring formal intervention under FED. R. CIV. P. 24. It is expensive. It is burdened by elaborate paperwork, including the drafting of a separate complaint and the preparation of motions and briefs. It is hedged about with technicalities, such as having to litigate under Rule 24 such issues as timeliness and the adequacy of existing representation (an issue which has presumably already been addressed at the class certification stage, and presumably determined in the representative's favor), and opening up automatic disclosure under FED. R. CIV. P. 26(a). As noted *infra*, *Navigant* would often force class members to go through this process long before they even know whether they will wish to object. None of these has any relation to the merits of the settlement: which is the only thing the objecting class member has any interest in — *and the only thing the appellate court should be interested in*.

(b) Appellate Courts Should Not Abdicate Their Responsibility To Do Substantive Justice in Favor of Gatekeeping Determinations by Lower Courts Unrelated to the Merits of a Settlement.

The role of the appellate courts in examining class action settlements is vital. "Because a district court may overlook a 'mutual indulgence' [quoted from *Bell Atlantic Corp.* v. *Bolger*, footnote 15 *supra*], appellate review advances the policy of assuring the fairness to shareholders that underlies the requirement of court approval." *Kaplan* v. *Rand*, 192 F.3d 60, 67 (2d Cir. 1999) (derivative suit). "Th[e] unique relationship among plaintiffs' counsel, plaintiffs, and defendants in class actions imposes a special responsibility upon appellate courts to hear challenges to fee awards by class members whose claims may have been reduced or in some way affected in exchange for large fee awards." *In re Cendant Corporation Prides Litigation*, 243 F.2d 722, 728 (3d Cir. 2001).

Appellate courts should be focused on the merits of cases, not on peripheral matters. Requiring objectors to intervene in order to appeal will not cut down on the number of appeals; it will just mean that courts of appeal will be faced with appeals from denials of intervention in addition to appeals from denials of objections. The primary issue will then be whether it was an abuse of discretion to deny intervention, not whether the settlement was fair, reasonable, and adequate to the class as a whole. As a Justice pointed out at oral argument in *Felzen*, there would then be "no sure right of review other

than on the abuse of discretion standard." Transcript of Oral Argument in *California Public Employees' Retirement System* v. *Felzen*, No. 97-1732, at 52. In the real world, as a Justice pointed out at oral argument in *Felzen*, district judges are going to look at the objections. If they do not like them, they are likely to deny intervention. *Id.* at 42. But the key question of fairness of the settlement will then be reviewed by the court of appeals only after having to deal with "14 other issues that could be crafted out of Rule 24." *Id.* at 44. Appellate courts should not allow trial courts to be their gatekeepers in this fashion.

Navigant affords a good example. The objectors in that case had pointed out a square violation of the PSLRA: not something that might or might not be deemed a violation in light of a subjective judgment, but a flat violation of the PSLRA's requirement that the settlement notice specify the amount of fees and costs class counsel would seek. 15 U.S.C. § 78u-4(a)(7). The district court's disregard of this plain requirement cried out for appellate correction; that is what a circuit court's job description is all about. (And awareness of this is a powerful incentive for district courts to be careful.) Instead, the circuit court entered into a lengthy dissertation on the principles of "timeliness" under Rule 24.

This emphasis on supposed "timeliness" in *Navigant* is particularly troublesome. In the real world, objectors will not normally know what a settlement will involve until they receive the notice. On the reasoning in *Navigant*, they will have no choice but to seek formal intervention, with the attendant expense and burdensome paperwork, at

that point, just to protect their ability to seek review if their objections are rejected. Indeed, under *Navigant* even that may be "untimely": *Navigant* encourages a searching examination into the history of the objector's knowledge, and suggests pushing the "timeliness" deadline as far back as the objector can be shown to have had some degree of awareness. Itself conducting such a search, the court in that particular case suggested a "timeliness" deadline seven months before the date of the order approving the settlement. App.3a-5a. That is not the kind of exercise appellate courts should be engaged in.[17]

C. If Nevertheless the Court Should Conclude That Intervention Is Necessary, No More Should Be Required Than a Pro Forma Post-Judgment Intervention As of Unconditional Right With Minimum Paperwork.

Finally, amici submit that fairly included in the question presented is the question of what should be required of a class member to intervene in order to appeal if the Court should nevertheless decide that such intervention is necessary. For all the same reasons just discussed, amici submit that nothing more should be required than a *pro forma* intervention, to satisfy whatever technical requirements may be perceived. It should be made clear to the lower courts that such intervention must

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[17] As the *Navigant* opinion shows, the objectors in that case had not slept on their rights. Well before the settlement notice was sent out, one of the objectors had filed his own lawsuit. And they had timely responded with their objections to the settlement notice.

be granted as of unconditional right; that a motion for such intervention is timely even if made after judgment; and that the paperwork normally required under FED. R. CIV. P. 24 — such as "a pleading setting forth the claim or defense for which intervention is sought," and a showing that "the applicant's interest is [not] adequately represented by existing parties" — should not be required.

Indeed, as to "timeliness" this result is clearly mandated by *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977). The Court there emphasized that in appraising "post-judgment intervention for the purpose of appeal," "the critical inquiry in every such case is whether in view of all the circumstances the intervenor acted *promptly after the entry of final judgment*." 432 U.S. at 395-96 (emphasis added). And the governing factor for the Court was that the intervenor had taken action within the 30-day limit for the filing of a notice of appeal, and hence the "motion to intervene was timely filed and should have been granted." 432 U.S. at 396. The suggestion in the *Navigant* opinion that the decisive element in *United Airlines* was that the intervenor had not "learn[ed] until after judgment of the circumstance ... that calls for intervention," App. 2a, is, with respect, simply wrong. Rather, as the dissent in *United Airlines* makes clear, that case stands for the proposition that intervention filed within the 30-day time limit for filing a notice of appeal is "timely under Rule 24 as a matter of law." 432 U.S. at 399.

IV. Conclusion

No intervention should be required of a class member in order to appeal rejection of properly presented objections to a settlement. If intervention is necessary, it should be merely *pro forma*.

Respectfully submitted,

THADDEUS HOLT
P.O. Box 440
Point Clear, Alabama 36564
(334) 990-7495
(Counsel of Record)

DAVID A. JENKINS
JOELLE E. POLESKY
Smith, Katzenstein & Furlow LLP
800 Delaware Avenue, 7th Floor
P.O. Box 410
Wilmington, Delaware 19899
(302) 652-8400

Attorneys for Amici Curiae

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